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No. 84-1324 (2)

In The
Supreme Court of the United States
October Term, 1984

R. A. ADAMS AND JOSEPH M. ONGIELLO,
Petitioners,

v.

ROBERT M. JASISNKI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT M. JASINSKI
2301 Collins Avenue, M-8
Miami Beach, Fl 33139
Telephone: (305) 538-4421
Pro se

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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RESTATEMENT OF QUESTION PRESENTED

WHETHER A DENIAL OF A MOTION FOR SUMMARY DISPOSITION BASED ON A DEFENSE OF QUALIFIED IMMUNITY IN A *BIVENS* ACTION IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291 WHEN THERE EXISTS A CLAIM FOR INJUNCTIVE RELIEF, WHICH IS NOT SUBJECT TO AN IMMUNITY DEFENSE.

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STATEMENT

In this interlocutory proceeding Petitioners, Chief Adams and Joseph Mongiello, the former I.N.S. Associate Regional Commissioner for the Southern Region, claim that they are entitled to qualified immunity from suit arising out of the search of the plaintiff's trunk at the Florida City Checkpoint. The statement of facts set forth in the Petitioners' "Statement" is essentially correct. However, the Respondent would like to point out that there is sharp disagreement concerning the demeanor of the Respondent. The Respondent's version of the incident as set forth in his Verified Complaint, Pet. App. 10a-17a, and Affidavit, Pet. App. 27a-29a, is in sharp contrast with Chief Adams' account of the incident. Fortunately, for the Respondent, much of what transpired at the checkpoint between Chief Adams and the Respondent was videotaped by a local news team. Whether or not the news station can be compelled to produce the unedited tapes, in order to straighten out the discrepancies once and for all, has not been decided due to the fact that the district court has stayed the trial of this matter along with all discovery. Resp. App. A.

The Petitioners actually filed two (2) Motions for Summary Judgment in this case. Their first motion for summary judgment and/or to dismiss was filed on September 3, 1982. It was denied on November 12, 1982. Resp. App. B. On January 28, 1983, a little more than two (2) weeks prior to the trial, the Petitioners filed a second motion for summary judgment and/or motion to dismiss, wherein they basically rehashed what had been argued earlier. The Petitioners are appealing the dismissal

of their appeal from the second motion for summary judgment and/or to dismiss. The Respondent did not raise the issue of timeliness with the appellate court. Fed.R. App.P. 4.

The Respondent's case is a *Bivens* action seeking damages arising out of the violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Respondent is no longer asserting any claim pursuant to 42 U.S.C. § 1983.

Injunctive relief has been requested. The Respondent has asked the district court to pass upon the methods used by the I.N.S. in its efforts to enforce the immigration laws enacted by Congress. The district court has yet to hear the Respondent's request for injunctive relief. In that the Petitioners have repeatedly asserted their right to re-establish the checkpoint at Florida City this issue is not moot.

SUMMARY OF ARGUMENT

A. That an Appellate Court should refrain from exercising jurisdiction to hear an interlocutory appeal involving a good faith immunity defense when the law is well settled and the facts are in dispute. Since Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, cannot be granted when a substantial controversy exists regarding material facts, the district court had no choice, other than to deny the Petitioners' Motion for Summary Judgment and/or to dismiss. The law is well-settled regarding the need for probable cause

in order to conduct a search at a fixed checkpoint, not the functional equivalent of the border. Furthermore, the law is clear that one may not even interrogate at a fixed checkpoint unless the Border Patrol Agent believes that the person interrogated is an alien.

B. The Supervisor of the Florida City Checkpoint, Petitioner, Joseph Mongiello, can be held responsible for the actions of his subordinates, if he failed to insure that his men were adequately trained and were familiar with the proper standards to be applied with reference to the interrogation and searches of aliens and citizens at fixed checkpoints. If the facts, at trial, show that Joseph Mongiello failed to take any reasonable steps to protect the motoring public, from blatently unconstitutional searches and seizures on the part of his subordinates, he should be held responsible. A supervisor should be held responsible when he does something or fails to do something that results in a constitutional violation, on the part of his subordinates.

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ARGUMENT

I. IN HIS MOTIONS FOR SUMMARY JUDGMENT, DEFENDANT R. A. ADAMS BASED HIS RIGHT TO SEARCH THE PLAINTIFF'S TRUNK ON THE BELIEF THAT PROBABLE CAUSE EXISTED: SINCE THE LAW REGARDING PROBABLE CAUSE IS CLEARLY ESTABLISHED, HE SHOULD NOT BE PERMITTED TO DELAY THE TRIAL BY FILING A FRIVOLOUS INTERLOCUTORY APPEAL

A. Defendant R. A. Adams Based His Motions For Summary Judgment On His Belief That Probable Cause Existed To Believe Aliens Were Hidden In The Trunk Of Plaintiff's Vehicle.

In his two (2) Motions for Summary Judgment, Petitioner Adams has argued that the sole basis for the search of the Respondent's trunk was that he had probable cause to believe that aliens were hidden in the Respondent's trunk. (Aff. of Adams, Pet. App. I 18a-24a) (Motion for S/J ¶ 3(g) R. 272[1]). Adams responded in the negative when asked if he believed that he had the right to inspect automobile trunks for aliens without a warrant, consent, or probable cause. (Notice to Admit #12, R. 187; Ans. # 12 R. 192).

In order to prevail on a motion for summary judgment based upon a "good faith" defense, a defendant must make a prima facie showing that either the law has changed after the incident or was clearly unsettled at the

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[1] R. refers to record on appeal; Pet. App. refers to Petitioner's Appendix; and Res. App. refers to Respondent's Appendix.

time the defendant violated a plaintiff's constitutional rights. *See e.g., Silverman v. Ballantine,* 694 F.2d 1091 (7th Cir. 1982) (right to counsel at point of arrest); *Jihard v. O'Brien,* 645 F.2d 556 (6th Cir. 1981); *Chagnon v. Bell,* 642 F.2d 1248 (D.C. Cir. 1980). The Court in *Harlow v. Fitzgerald,* 429 U.S. 800 (1982), "adjusted" the qualified immunity standard established by its earlier decision and dispensed with the subjective test of official good faith. In light of *Harlow,* the "good faith" of the defendant officials is tested by purely objective standards. Officials are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818; *see also, Bueno v. City of Donna,* 714 F.2d 484 (5th Cir. 1983).

The Court has consistently defined probable cause as follows: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient . . . good faith is not enough." *Carroll v. United States,* 267 U.S. 132, 161 (1925); *United States v. Ross,* 456 U.S. 798 (1982); *Brinegar v. United States,* 338 U.S. 160 (1949); *Henry v. United States,* 361 U.S. 98 (1959). Thus, it cannot be said that the law regarding probable cause was not clearly established. Since the law concerning probable cause was clearly established, the immunity defense should fail unless the defendants can prove that they neither knew nor should have known of the relevant legal standard. *Harlow,* 457 U.S. at 819. When the law is clearly established, interlocutory appeals serve no useful purpose.

B. Chief Adams Did Not Believe That The Florida City Checkpoint Was The Functional Equivalent Of The Border.

The Petitioners have never asserted their belief that the Florida City Checkpoint was the functional equivalent of the border in any responsive pleading or affidavit. Chief Adams was mistaken in his belief that 8 U.S.C. Sec. 1357 gave him authority to search [inspect] for aliens at fixed checkpoints not the functional equivalent of the border. In order to understand what happened on April 18, 1982 one need look no farther than the affidavit of Chief Adams in support of his motion for summary judgment. Pet. App. 18a-24a. Paragraph 3 of the affidavit points out that Chief Adams worked the San Clemente California Checkpoint on I-5 from June 1969 until August 1972. He has not worked a checkpoint since then. During that time Chief Adams "witnessed thousands of automobile inspections."

In paragraph 5 Chief Adams swore under oath that

> [t]he San Clemente procedures have been in effect since 1969, when the checkpoint was established. The same procedure used there and the same criteria for stopping vehicles and conducting inspections, was used in Florida City.

Id.

Prior to this court's holding in *United States v. Ortiz,* 422 U.S. 891 (1974), that the Fourth Amendment forbids the searching of automobiles at traffic checkpoints not the functional equivalent of the border, in the absence of consent or probable cause, the lower courts had uniformly held that pursuant to 8 U.S.C. § 1357 border patrol agents had authority to search vehicles for aliens at all fixed check-

points. *See Bowen v. United States,* 422 U.S. 916, 918 n. 1 (1974). This appears to have been a routine procedure prior to *Ortiz. See e.g., United States v. Thompson,* 475 F.2d 1359 (5th Cir. 1973); *Mienke v. United States,* 452 F.2d 1076 (5th Cir. 1971); *Morales v. Hamilton,* 391 F. Supp. 85 (D. Ariz. 1975).

To make matters worse for Chief Adams, he was instructed by Petitioner Mongeillo that "searches conducted by Border Patrol Agents will be based only on probable cause, consent or a search warrant." Resp. App. C. Unfortunately, Petitioner Mongeillo used the word "search" instead of "inspection." Apparently, Chief Adams believed that he could not conduct full-fledged searches—in other words, searches in areas too small to conceal an alien. This was the law as Chief Adams understood it, based on his three and one-half years of training at San Clemente. Mongeillo should have realized that Chief Adams had not worked a checkpoint since 1972 and that there had been some drastic changes in the law since Chief Adams last worked a checkpoint.

The Petitioners' claims of immunity turn on disputed questions of fact and are inextricably bound up with the merits of the claims. The objective reasonableness, probable cause, is a question of fact for a jury to decide. *See Smiddy v. Varney,* 665 F.2d 261, 265 (9th Cir. 1981), *cert denied,* 459 U.S. 829 (1982); *McKenzie v. Lamb,* 738 F.2d 1005, 1008 (9th Cir. 1984) (summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause).

Chief Adams should have known that he could not conduct inspections for illegal aliens pursuant to 8 U.S.C. § 1357 absent consent or probable cause.

C. Even If One Reviews The Facts In The Light Most Favorable To Petitioners The Alleged Conduct Complained About On The Part Of The Plaintiff Fails To Even Establish Reasonable Suspicion.

The Court in *United States v. Brignoni-Ponce,* 422 U.S. 873, 884-85, 95 S.Ct. at 2581-82 (1975), set forth the factors to be considered in determining whether "reasonable suspicion" exists in a non-fixed checkpoint situation.[2] A careful review of the factors set forth in *Brignoni-Ponce* demonstrates that the defendants have failed to establish the existence of even reasonable suspicion to believe that the plaintiff was harboring aliens in the trunk of his vehicle. The petitioners' argument to the contrary is patently frivolous.

II. THE DEFENDANTS SHOULD NOT BE PERMITTED TO ARGUE THAT THE STATUS OF THE CHECKPOINT WAS AMBIGUOUS WHEN THEY HAVE FAILED TO ARGUE OR OFFER PROOF IN THEIR MOTIONS FOR SUMMARY JUDGMENT THAT THE LAW REGARDING FIXED CHECKPOINTS WAS NOT CLEARLY ESTABLISHED AND THAT FLORIDA CITY WAS IN FACT THE FUNCTIONAL EQUIVALENT OF THE BORDER

Although there was some ground for confusion about the state of the law in the former Fifth Circuit at the

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[2] Factors to be considered include: (1) characteristics of the area in which the vehicle is encountered; (2) unusual patterns of traffic on the particular road; (3) proximity to the border; (4) information about recent illegal crossings in the area; (5) appearance of the vehicle; (6) number and appearance of the passengers; (7) behavior of the driver; and (8) behavior of the passengers. *Brignoni-Ponce,* 422 U.S. at 884-85. The experience of the agents is also a relevant factor. *United States v. Pacheco,* 617 F.2d 84, 85 (5th Cir. 1980). Conversely, newly arrived Border Patrol Agents unfamiliar to the area are not entitled to the same deference. *United States v. Orona-Sanchez,* 648 F.2d 1039 (5th Cir. 1981) (Unit A).

time *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), was decided, that confusion has long since been cleared up. *See Bowen v. United States,* 422 U.S. 916, 918 n. 1 (1975). The former Fifth Circuit has specifically set forth the factors to be used in determining whether a checkpoint location is in fact the functional equivalent of the border. *See United States v. Reyna,* 563 F.2d 1169, 1170 (5th Cir. 1977), *cert. denied,* 439 U.S. 871 (1978); *see also United States v. Brennan,* 538 F.2d 711, 716 (5th Cir. 1976); *see also United States v. Arredondo-Hernandez,* 574 F.2d 1312 (5th Cir. 1978) ("consent or probable cause is required to convert a permanent checkpoint stop into a constitutional search").

Since the law regarding fixed checkpoint searches was clearly established on April 18, 1982, the respondent cannot understand why the petitioners should be raising this issue on interlocutory appeal (Suppl. Brief of Appl't p. 7), especially in light of the uncontroverted fact that Chief Adams has unequivocally stated that he based his right to search on his good faith belief that he had probable cause to believe that there were aliens in the plaintiff's trunk (Mot. for S/J, ¶ 3(g), R. 272) (search only when probable cause exists). If the petitioners entertained a "good faith" belief that Florida City was the functional equivalent of the border, they certainly would have advanced that argument during the hearing on the motion for a temporary restraining order in *Hartfield v. Commissioner, etc.,* Case No. 82-807-CIV-CA (S.D.Fla. 1982) (sought injunctive relief to halt checkout). Instead the petitioners waited until this case was up on interlocutory appeal, with an inadequate record, to raise the argument that Florida City was reasonably believed to be the functional

equivalent of the border (Suppl. Brief of Appl't p. 7). Issues important enough to be raised on appeal should be raised first at the trial court level, where an evidentiary hearing can be relied upon to establish a complete record. An emergency hearing on a temporary restraining order is hardly the place to establish a complete record of all relevant facts and issues, especially when the plaintiff was not even a party to that action.

The aforementioned allegation on the part of the defendants is outrageous in light of the following facts:

(a) R. A. Adams, in response to Plaintiff's Interrogatory ¶15, which reads: "If Agent Adams believed he was in fact conducting a valid border search or search at the 'functional equivalent of the border,' please state in detail: (a) Exactly what facts and laws lead Agent Adams to the conclusion that he was conducting a valid border search?", answered as follows: "N/A." R. 237-54.

(b) During the *Hartfield, supra,* hearing, the attorney for Key West asked CHIEF ADAMS, "[h]ow many cars have you stopped at that checkpoint at Florida City that had been travelling internationally?" Defendants' attorney, Mr. Rosenberg, objecting, aptly noted that, "Your Honor, I'm not sure we are not in an area of absurdity here." *Hartfield* Tr. at 90. Since *United States v. Renya, supra,* specifically made the "ratio" of foreign to domestic traffic the test of "functional equivalency," the defendants' assertions, in their briefs, that they believed that Florida City was the functional equivalent of the border is, quoting Mr. Rosenberg, "an area of absurdity." *See also* Resp. App. D.

The defendants have failed to demonstrate that they relied in good faith on the belief that Florida City was the functional equivalent of the border. Without any such proof, they should not be permitted to even raise a good faith defense based upon such a belief. *Fidler v. Rundle,* 497 F.2d 794 (3d Cir. 1974); *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 828 (3d Cir. 1976).

III. NEITHER HARLOW NOR RULE 56 APPLIES TO ACTIONS WHERE INJUNCTIVE RELIEF IS SOUGHT: THEREFORE, AN INTERLOCUTORY APPEAL FAILS TO SERVE ANY USEFUL PURPOSE IN THAT THIS ACTION WILL CONTINUE EVEN IF THE DEFENDANTS HAVE ESTABLISHED A GOOD FAITH IMMUNITY DEFENSE

A good faith defense may not be asserted as a defense to a claim for injunctive relief. *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974); *Knell v. Bensinger,* 522 F.2d 720 (7th Cir. 1975); *Hupart v. Board of Higher Educ.,* 420 F.Supp. 1087, 1107-08 (S.D. N.Y. 1976). Even a favorable ruling in the defendants' favor on their Motion for Summary Judgment would not terminate the plaintiff's action, at least against Chief Adams[3], since there would still exist a claim for injunctive relief. Thus, the purpose of permitting an interlocutory appeal on the "good faith" defense would not serve the purpose for which an interlocutory appeal was intended to serve, namely: "to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow,* 457 U.S. at 818.

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[3] Petitioner Mongiello has retired from service with the I.N.S.

In *Harlow v. Fitzgerald,* 457 U.S. at 819 n.34 (1982), the Court noted that:

> We emphasize that our decision applied only to suits for civil damages arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

Furthermore, the Court in *United States v. Martinez-Fuerte,* 428 U.S. 543, 559 (1976), pointed out that

> a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

The plaintiff, consistent with *Martinez-Fuerte,* wishes to test the reasonableness of using Florida City as a checkpoint, in the absence of a situation similar to the one created by the unprecedented influx of refugees caused by the Mariel boatlift. *United States v. Gordo-Marin,* 497 F.Supp. 432 (S.D. Fla.), *aff'd* 659 F.2d 58 (5th Cir. 1981). The plaintiff questions the logic of *McSurely v. McClellan,* 697 F.2d 309 (D.C. 1982), permitting interlocutory appeals when a finding of a good faith immunity will not put an end to the litigation.

IV. PERSONAL PARTICIPATION IS NOT A NECESSARY PREREQUISITE TO IMPOSING LIABILITY UPON THE SUPERVISORY DEFENDANT MONGIELLO

In civil rights litigation, a federal official cannot be held vicariously liable for the acts of his subordinates. *Bowen v. Watkins,* 669 F.2d 979, 988 (5th Cir. 1982); *Reimer v. Smith,* 663 F.2d 1316, 1329 (5th Cir. 1981). Personal involvement will be sufficient to find liability

where the supervisor directs or approves the act in question. *Reimer, supra.*

When a duty exists to train or supervise subordinates, a supervisor can be held liable when there is a failure to properly train or supervise which causes a constitutional violation. *See Sims v. Adams,* 537 F.2d 829 (5th Cir. 1976); *McClelland v. Factern,* 610 F.2d 693, 695-96 (10th Cir. 1979); *Henzel v. Gerstein,* 608 F.2d 654 (5th Cir. 1979).

The issue, correctly phrased, is whether the supervisor has done something, or failed to do something which ought to have been done, which was a proximate cause of the violation of the plaintiff's constitutional rights. *Black v. Stephens,* 662 F.2d 181, 189 (3d Cir. 1981); *Bowen v. Watkins,* 669 F.2d 979, 988-89 (5th Cir. 1982).

Defendant Mongiello has not set forth any facts which absolve him of liability other than the fact that he was not physically present on the scene. As such, his claim of qualified immunity must fail.

V. QUALIFIED IMMUNITY IS NOT SUBJECT TO INTERLOCUTORY APPEAL UNDER THE COLLATERAL ORDER DOCTRINE[4]

The denial of summary judgment is interlocutory in nature and thus not appealable. *In re Smith,* 735 F.2d 459 (11th Cir. 1984). However, it is generally held that a denial of summary judgment based on a claim of ab-

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[4] The Brief for the Respondent filed in *Mitchell v. Forsyth,* cert granted, No. 84-333 (Oct. 29, 1984), deals extensively with the question of the appealability of claims based upon qualified immunity. The Respondent has attempted to avoid rehashing what has already been said on the subject.

solute immunity is appealable. See e.g. *Flanagan v. United States,* — U.S. —, 104 S. Ct. 1051 (1984); *Argromayor v. Colberg,* 738 F.2d 55 (1st Cir. 1984); *Spiess v. C. Itoh Co.,* 725 F.2d 970 (5th Cir. 1984) (employment discrimination); *cf. San Filippo v. U. S. Trust Co. of New York,* 737 F.2d 246, 248 (2nd Cir. 1984) (nonfrivolous claim of absolute immunity presents appealable issue).

The reason for appealability in absolute immunity cases is that absolute immunity protects defendants from the burden of trial as well as liability. *William v. Collins,* 728 F.2d 721 (5th Cir. 1984) ("This absolute immunity does not hinge on functional analysis as with constitutional torts."); *Powers v. Lightner,* 752 F.2d 125 (7th Cir. 1985) ("Qualified immunity grants no absolute right not to be subjected to trial. . . .").

> A claim of absolute immunity, like a claim of double jeopardy, should be determined before a trial on the merits. In each situation a defendant contests a plaintiff's right to "hale him into court." The district court here conclusively determined the immunity question. Immunity is important and collateral to the merits of the action. The right to immunity is a question of law and is arguably lost once the trial is held.

Chevez v. Singer, 608 F.2d 420, 421 (10th Cir. 1983).

However, since ". . . the collateral order exception is a narrow one and reserved for rare cases", *Bever v. Gilbertson,* 724 F.2d 1083, 1087 (4th Cir. 1984); *See e.g., Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), it has been held that

> because the rights encompassed by the doctrines of absolute and qualified immunity are not coextensive

> with respect to subjection to trial, the lesser right afforded by qualified immunity does not necessitate the right to interlocutory appeal that absolute immunity does.

Powers v. Lightner, 752 F.2d at 1255.

The Petitioners in this case have failed to show that their right, if any, to a qualified immunity defense, is "incapable of vindication on appeal from final judgment." *United States v. W.H. Moseley Co.,* 730 F.2d 1472, 1475 (Fed. Cir. 1984).

A. Petitioners' Appeal Has Failed To Present A Serious And Unsettled Question Of Law.

In *Bever v. Gilbertson,* 724 F.2d at 1088 the court aptly noted that

> one of the requirements for immediate appealability of a collateral order under the *Cohen* doctrine is that is present a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

This additional requirement, that an interlocutory appeal present "a serious and unsettled question of law", was added to the *Cohen* elements in *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982). In the case at bar there are no serious and unsettled questions of law that are worthy of review by an appellate court. The only issue in this case is whether or not Chief Adams acted in a reasonable manner when he attempted to pry open the Respondents trunk with a crowbar in order to conduct an inspection for aliens. Chief Adams based his right to search on 8

U.S.C. § 1357 which permits Border Patrol Agents to search at fixed checkpoints, not the functional equivalent of the border, when probable cause exists to believe that a particular vehicle is being used to transport illegal aliens. The issue presented to the trial court was no different from what the trial court would have had to decide if asked to decide a motion to suppress. Motions to suppress are filed on a routine basis in criminal actions. The courts are called upon to decide the issue of probable cause in numerous cases involving a myriad of factual situations. There simply is no reason to suspect that the district courts will not be able to determine whether an official's discretionary action has violated clearly established law. Officials are protected in that

> the trial itself transgresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded. Judges are not infallible, and errors may be anticipated in application of the *Harlow* standard like any other. Nevertheless, few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights, far too few to invoke the *Harlow* policy of preventing the risk of litigation from deterring good candidates from seeking office or good office holders from performing their duties.

Kenyatta v. Moore, 744 F.2d 1179, 1184 (5th Cir. 1984).

In this case "the danger of denying justice by delay" is great. However, it is the Respondent that is being denied justice. It has been over three (3) years since this lawsuit has been filed. The stay entered by the trial court has prevented the Respondent from preserving the unedited videotapes, which will conclusively prove one way or another how the I.N.S. was conducting the checkpoint

at Florida City. Since the Petitioners have belatedly raised the issue that Florida City was in fact the functional equivalent of the border, it will be necessary to recover evidence rebutting any such assertion. The passage of time will make this a far more costly task.

One of the Respondents' witnesses has passed away while this case was up on appeal. Most likely, much of the memories of the witnesses in this matter will have faded into oblivion by the time this case gets to trial. Surely, this does not comport with the "just, speedy, and inexpensive determination of" the action. Fed.R.Civ.P. 1.

This case does not represent an isolated incident. The Respondent was one of four attorneys that were directed to the secondary inspection area at Florida City. Three of the four attorneys were ordered to open their trunks for inspection. One of the attorneys even had a "Nike" shoe box inspected by a Border Patrol Agent who readily asserted that he had authority to search for drugs. Resp. App. E.

"With increasing frequency [the courts] are requested to pass upon the method used by the Immigration Service (the I.N.S.) in its efforts to enforce the immigration laws enacted by Congress." *Zepeda v. United States I.N.S.*, 753 F.2d 719 (9th Cir. 1985).

The Respondent knows of no other federal agency that has been enjoined with such frequency for violating Fourth Amendment rights of citizens. *See e.g. Zepeda, supra; Illinois Migrant Council v. Pilliod,* 540 F.2d 1062 (7th Cir. 1976), reheard in banc, 548 F.2d 715 (1977); *Au Yi Lau v. United States Immigration and Naturalization Service,* 590 F.2d 497 (3rd Cir. 1979); *Marquez v. Kiley,* 436 F. Supp. 100 (S.D.N.Y. 1977). The Respondent,

in his action for injunctive relief, has attempted to impose restraints on how the I.N.S. conducts inspections at the Florida City checkpoint, even in the event that the district court determines that Forida City is a reasonable location to establish a checkpoint, absent the extraordinary number of alien traffic created by the 1980 Mariel Boatlift.

Ultimately, the Respondent hopes to prove that the checkpoint at Florida City was a mere "pretext." The I.N.S. was not looking for aliens—they were looking for drugs! *See 1982 Annual Report of the Immigration and Naturalization Service* at 7 ("The I.N.S. supported the Interagency Task Force on Drug Enforcement, particularly in South Florida."). Since the I.N.S.'s own records indicate that the influex of Haitian arrivals in Miami had virtually come to a halt, *Id.* at 8, what other reason could possibly justify such rash action on the part of the I.N.S.?

—o—

CONCLUSION

The Judgment of the Court of Appeals should be affirmed and the case remanded to the District Court.

Respectfully submitted,

ROBERT M. JASINSKI
The Roney Plaza—Suite M-8
2301 Collins Avenue
Miami Beach, FL 33139
(305) 538-4421

Pro se

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, et al.,

Defendant.

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

(Filed April 25, 1983)

This matter arose upon Defendants' motion for protective order. After reviewing the motion, supporting memorandum, the Plaintiff's response and the file, it is

ORDERED AND ADJUDGED that the motion is GRANTED and the (4) notices of deposition dated March 17, 1983 are quashed.

It is further

ORDERED AND ADJUDGED that all further discovery be stayed pending a decision of the Court of Appeal.

DONE AND ORDERED In chambers at Miami, Florida, this 25th day of April, 1983.

/s/ James W. Kehoe
United States District Judge

cc: Robert Rosenberg, AUSA
Alan S. Kessler, Esquire

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, JOE MONGIELLO, et al.,

Defendants.

ORDER DENYING MOTION TO DISMISS AND/OR SUMMARY JUDGMENT

(Filed November 12, 1982)

This matter arose upon Defendants' motion to dismiss and/or motion for summary judgment.

After reviewing said motion, the memoranda of law of the respective parties and the file, it is

ORDERED that the motion filed September 3, 1982 is hereby DENIED.

DONE AND ORDERED in chambers at Miami, Florida, this 12th day of November, 1982.

/s/ James W. Kehoe
United States District Judge

CC: Robert A. Rosenberg, Esquire
Alan S. Kessler, Esquire

APPENDIX C

MEMORANDUM

SR 40/33.7

Subject: Traffic Check, Highway #1, Florida City.

Date: April 13, 1982.

To: Chief Patrol Agent, Miami, Florida.

From: Joseph A. Mongiello, Associate Regional Commissioner, Enforcement, Southern Region.

/s/ Joseph A. Mongiello

I have reviewed your plans for conducting a traffic check operations at Florida City. I have also reviewed intelligence data, records of arrest of deportable aliens and other material which indicate that aliens are entering the U. S. without inspection in the general area of the Florida Keys. In order to intercept those aliens as they proceed north, your plan to utilize the forty-one officer REACT team detailed to Krone North, is approved.

You should plan to commence the operation at 8:00 AM on Sunday, April 18 and terminate at 4:00 PM on Monday, April 26. A complete evaluation of the operation will be made during the week of April 26, and decisions as to future traffic check operations will be made following our evaluation.

Officers presently assigned to Krone will be considered on detail to Miami Sector, under the supervision of the Chief Patrol Agent. You should prepare 52's to document the detail from Program 3110 to Program 2110. ACPA Chandler will be your principal supervisor on the scene, with overall responsibility for the checkpoint operation. Operational planning must include immediate re-

sponse capability to events at Krone North necessitating a REACT team presence.

The checkpoint will be an INS operated facility, under the authority of Section 287 of the I&N Act. Initial examination of vehicles and occupants will be conducted by Border Patrol Agents. Although other agencies such as Customs and DEA may wish to have officers present, their participation will be limited to secondary inspections. Any searches conducted by officers from other agencies must be undertaken under their own authority to search and seize. Border Patrol Agents will conduct their inspections under the guidelines of the Supreme Court's decision in *Martines-Fuerte*. Searches conducted by Border Patrol Agents will be based only on probable cause, consent or a search warrant.

APPENDIX D

Transcript of Hearing On TRO

Hartfield v. Commissioner, 82-807-CIV-CA (p. 3)
(S.D. Fla. 1982)

THE COURT: May I ask a few preliminary questions of counsel?

Does the government concede that the stopping of a vehicle under these circumstances alleged here and conducting a search on a routine basis, without probable cause or reasonable suspicion, would be unlawful?

MR. ROSENBERG: Your Honor, the word "search" presents a problem here and I would like to be able to discuss that for a second. What the government is doing here is conducting an inquiry regarding citizenship. Now, if the Court is then saying, beyond that a search is being conducted without probable cause, that is not what is happening from our point of view and that may well be improper.

THE COURT: Then, for the purpose of this hearing, you would concede that if the stopping were done and routine searches were conducted without probable cause or reasonable suspicion, that would be a violation of the Fourth Amendment?

MR. ROSENBERG: If an officer is doing that, that is not the typical procedure being done and that officer in that one instance may be violating the Fourth Amendment. But I would like to make a statement to the Court, if I can, because I think I can. . . .

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 82-0814-Civ-JWK

ROBERT M. JASINSKI,

Plaintiff,

vs.

R. A. ADAMS, JOE MONGIELLO and
UNITED STATES BORDER PATROL,

Defendant.

SWORN AFFIDAVIT OF NORMAN KENT

State of Florida, County of Broward, SS.

BEFORE ME, the undersigned authority, personally appeared Norman Kent, who, after being duly sworn, on oath, deposes and states the following:

(1). I am an attorney practicing law in Fort Lauderdale, Florida.

(2). On April 18, 1982 at approximately 5:30 pm. I was returning from a weekend in the Keys, and reached the Florida City Checkpoint of the U.S. Border Patrol.

(3). I was driving a 1980 Camaro and was wearing only green dungaree shorts and sandals.

(4). The only "passenger" in my vehicle was my six year old golden retriever, "Daybreak," a watchdog, who was barking loudly at the uniformed officers stopping vehicles in front of me.

(5). When I reached the checkpoint, my vehicle was visually inspected by a border guard—whose name I don't recall—and I was then asked to open the trunk of my car.

(6). I asked why and was told my trunk "was low to the ground," which to the best of my knowledge, is not unusual for a Camaro.

(7). As I stepped out of the car, I was asked my citizenship, I advised the guard that "I was an American, and a practicing Criminal lawyer in Fort Lauderdale."

(8). I opened the trunk, and the guard reached in and lifted open a green Nike shoebox to find my dirty softball cletes therein.

(9). I then sarcastically inquired of him whether he was seeking out dehydrated aliens. He responded by saying the Border God (sp.) was also permitted to search for illegal drugs. I responded by saying that was something a Court would have to decide, not you.

(10). The trunk was then closed and I went on without further interruption. The actual inspection took no more than 60 seconds, but was very irritating in the manner in which it was conducted. These people are supposed to be working for us, not against us.

FURTHER, AFFIANT SAYETH NOT.

/s/ Norman Elliot Kent

Sworn to and Subscribed before me this 14th day of September, 1982.

/s/ Kathleen A. Falls, Notary Public, State of Florida at Large.

My commission expires: May 11, 1983.